



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 17, 1998

Mr. Paul C. Sarahan
Acting Director, Litigation Support
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-1691

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 116807.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all documents pertaining to Bell Processing, Inc.'s ("Bell") Iowa Park Type I Landfill, Permit No. 1571. You state that you have released some of the requested information to the requestor. You claim, however, that the remaining information is excepted from disclosure by sections 552.101, 552.103, 552.107, 552.108, 552.111 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the sample documents you have submitted.¹

You argue that Attachments A-E and I may be withheld under section 552.103 because of a pending enforcement action. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You state that there is currently an enforcement action pending against Bell which may only be resolved through settlement, administrative hearing, or trial. We have reviewed the representative documents for which the commission has asserted section 552.103(a) based on the enforcement action. We conclude that they are related to the pending enforcement action against Bell. Therefore, the commission may withhold Attachments A-E and I under section 552.103(a).²

We note, however, that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, you assert that section 552.117 excepts the social security numbers of the commission's employees contained in Attachment F. Section 552.117 excepts from required public disclosure the home addresses, home telephone numbers, social security numbers, or personal family members information of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information, but not the entire document, if a current or former employee or official requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

Lastly, you argue that section 552.108 excepts Attachments G and H from public disclosure. Section 552.108, the "law enforcement exception," provides in relevant part as follows:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; [or] (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication. . . .

²You also assert sections 552.107 and 552.111 for the same information excepted by section 552.103. Thus, we need not address your sections 552.107 and 552.111 claims.

(b) [a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; [or] (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication. . . .

This office has held that records of criminal investigations conducted by governmental agencies may be withheld from disclosure under limited circumstances. For example, records that otherwise qualify for the section 552.108 exception, such as documentary evidence in a police file on a pending case, do not necessarily lose that status while in the custody of an agency not directly involved with law enforcement. Open Records Decision No. 272 (1981) at 1-2. Similarly, in construing the statutory predecessor to section 552.108, this office concluded that if an investigation by an administrative agency reveals possible criminal conduct that the agency intends to report or already has reported to the appropriate law enforcement agency, then section 552.108 will apply to the information gathered by the administrative agency if its release would unduly interfere with law enforcement. Open Records Decision No. 493 (1988) at 2 (construing predecessor statute).

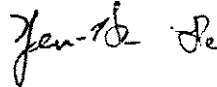
You explain that the documents in Attachment H concern criminal conduct that has been reported to the appropriate law enforcement officials, and that the case is pending with the police. As the proper custodian of the information, you have invoked section 552.108 and shown that release of the requested information would interfere with the detection, investigation or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision No. 493 (1988). Therefore, we conclude that the requested information may be withheld under section 552.108(a)(1).

As for Attachment G, you explain that the "information [is] related to law enforcement activities conducted by the Special Investigation Section of the [commission], in conjunction with a federal law enforcement agency." You further explain that the federal law enforcement agency had shared the information with the Special Investigations Section. As the proper custodian of the information in Attachment G, you state that section 552.108(b)(2) excepts the information from disclosure because the "documents in this matter related to a criminal investigation which did not result in indictment, conviction, or deferred adjudication," and that the case is "closed." Based on your representation, we conclude that section 552.108(b)(2) excepts Attachment G from disclosure, and that the information does not lose its status while in the possession of the commission, which is a proper custodian in this instance.³

³Because section 552.108 excepts Attachments G and H from public disclosure, we need not address your other arguments to withhold these documents.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/ch

Ref: ID# 116807

Enclosures: Submitted documents

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(w/o enclosures)